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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALABAMA DEPARTMENT OF CORRECTIONS,

PETITIONER

V.

WILLIE JAMES GLOVER,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNSEL FOR PETITIONER

I.

QUESTION PRESENTED

WHETHER OR NOT THE TAXING OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 AGAINST A STATE AS COSTS WHERE THE STATE WAS NEITHER A PARTY OR HELD LIABLE PURSUANT TO 42 U.S.C. §1983 IS VIOLATIVE OF THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II.

PARTIES TO THE PROCEEDING

The following are parties to this action:

1. Willie James Glover
2. Alabama Department of Corrections
3. James Towns

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BRIEF FOR PETITIONER

OPINIONS BELOW

1. The opinion of the United States District Court for the Middle District of Alabama appears in Appendix A.

2. The opinion of the United States Court of Appeals for the Eleventh Circuit appears in Appendix B.

3. The opinion of the United States Court of Appeals for the Eleventh Circuit denying rehearing and suggestion for en banc consideration appears in Appendix C.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. §2101. The order of the United States Court of Appeals for the Eleventh Circuit was issued February 27, 1985, and this petition is filed within sixty (60) days of said date.

QUESTION PRESENTED FOR REVIEW

I. Whether or not the taxing of attorney's fees pursuant to 42 U.S.C. §1988 against a state as costs where the state was neither a party or held liable pursuant to 42 U.S.C. §1983 is

violative of the Eleventh Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, which provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§1983 and 1988, which appear in their entirety in Appendix D.

STATEMENT OF THE CASE

THE DISTRICT AND APPELLATE COURT PROCEEDINGS

This action was originally filed by Plaintiff, Willie James Glover, in the

Middle District of Alabama in March, 1979, as a pro se inmate complaint. The original complaint named the following as Defendants: Larry D. Bennett, James C. Cooke, James Towns, Hardy Sims, and the Alabama Board of Corrections. On July 26, 1979, Plaintiff added Defendant, Robert G. Britton, to the action by amended complaint.

On May 21, 1979, the District Court appointed Magistrate Lewis Gwaltney as Special Master in this case.

Directed verdicts were granted at the conclusion of Plaintiff's trial for all defendants except James Towns. The jury returned a verdict against Towns in his individual capacity for twenty-five thousand dollars punitive damages and one dollar compensatory damages. Attorney's fees were taxed by the District Court as

costs against the State of Alabama.

Appeal was taken to the United States Court of Appeals for the Eleventh Circuit. The case was affirmed. Rehearing was requested; it was denied on February 27, 1985.

THE FACTS

In November of 1978, Plaintiff, Glover, a prisoner in Alabama's Draper Correctional Center was stabbed by a fellow inmate. The stabbing occurred the day after Defendant, Officer James Towns, stated to a group of inmates that Glover's life was worth only five or six packs of cigarettes.

REASONS FOR GRANTING THE WRIT

I. WHETHER OR NOT THE TAXING OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 AGAINST A STATE AS

COSTS WHERE THE STATE WAS NEITHER A PARTY OR HELD LIABLE PURSUANT TO 42 U.S.C. §1983 VIOLATIVE OF THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

This case raises issues concerning an attorney's fee award made under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988. The District Court assessed attorney's fees and costs against the State of Alabama. The State of Alabama respectfully argues that the affirmance of the District Court's award placed the Eleventh Circuit in error.

Foremost, the law is clear that a state is immune from damages under the Eleventh Amendment to the United States Constitution. In Edelman v. Jordan, 415 U.S. 651 (1974), this Court held:

> "Thus the rule has evoked that a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment."

In Quern v. Jordan, 440 U.S. 332, 334 (1979), this Court considered suits brought pursuant to 42 U.S.C. §1983 and specifically held that states are immune from an award of damages under 42 U.S.C. §1983. The Court in Quern, 440 U.S. at 341, stated that Congress did not intend to abrogate state Eleventh Amendment immunity in enacting 42 U.S.C. §1983. It is also clear that the Eleventh Amendment would bar an award for damages against a state official in his official capacity. Williams v. Bennett, 689 F.2d 1370, 1378 (11th Cir. 1982), cert. denied, ___U.S.___, 104 S.Ct. 335, (1984).

Accordingly, there is no doubt that

a suit against the State of Alabama is barred by the Eleventh Amendment, unless Alabama consents to such an action. Alabama v. Pugh, 438 U.S. 781 (1978). However, Alabama is prohibited from granting said consent. Ala. Const. Art. 1, §14.

In the present case, Glover received a substantial award of damages from Defendant Towns in Towns' individual capacity. Glover did not receive a judgment against the State of Alabama or the Alabama Board of Corrections. Petitioner submits that Glover is prohibited from receiving an attorney's fee award under 42 U.S.C. §1988 from an entity he did not "prevail" against in his §1983 suit. Glover prevailed against Towns in Towns' individual capacity only and did not, in fact, prevail against the

Alabama Board of Corrections.

Petitioner is well aware of this Court's opinion in Hutto v. Finney, 437 U.S. 678, (1978). This opinion, upon first glance, seems to authorize an award of attorney's fees against a state even when that state has not been named as a party and has not consented to the removal of its Eleventh Amendment immunity. However, the holding in Hutto is distinguishable from the instant case; therefore it does not bind the Court in this case.

Initially, the suit in Hutto concerned a claim for injunctive relief arising out of an action commencing in 1969. The Court determined that "suits brought against individual officers for injunctive relief are, for all practical purposes, suits against the State

itself." Id. at 700. Furthermore, the suit in Hutto concerned a gross violation of previous district court orders and encompassed the entire Arkansas prison system. The violations were of such magnitude as to prohibit the assessment of damages against any single individual. In fact, the Court stated that "the individual officers have no personal interest in the conduct of the State's litigation." Id. at 700, n. 32. The officials named in Hutto were sued in their official, not individual, capacities. Finally, these officials were determined to be litigating in bad faith. Id. at 689.

The Supreme Court in Hutto appears to state that the representation of defendants by the Arkansas Attorney General throughout the litigation

evidences sufficient action by Arkansas to justify an attorney's fee award against the state's interest. The State of Alabama respectfully submits that its involvement of the instant case is not indicative of sufficient state involvement to justify the award of attorney's fees against the State. The office of the Alabama Attorney General conducted a general defense on behalf of all defendants named in this action. As previously stated, at the conclusion of the trial, all but Defendant Towns received a directed verdict.

Mr. Justice Rehnquist dissenting in Brandon v. Holt, 53 U.S.L.W. 4122 (U.S. Jan. 21, 1985) stated that the Court's decision in Hutto was "more readily interpreted as an estimate of what would probably happen in the particular case,

than as a cyptic announcement of the novel doctrine for which the Court now says that it stands." Id. at 41.

The State's liability, in addition to being foreclosed by this Court's interpretation of the Eleventh Amendment's bar to liability, also raises serious problems concerning the stability of the State's penal system. The State has a direct interest in providing sufficient numbers of employees to staff the various positions in the Alabama Prison System. However, the Eleventh Circuit's opinion in this case would conceivably jeopardize the State's ability to provide representation for state officials against the ever-increasing multitude of lawsuits filed by state prison inmates. Knowing that appearances for its employees would

result in insurmountable fees and costs which in turn will inflict undue hardship upon the State Treasury, the State will, in all likelihood, become increasingly hesitant to undertake such representation. The unavoidable result would be that state prison officials be required to employ private counsel. A migration from the Department of Corrections would in all likelihood follow.

CONCLUSION

In conclusion, the Petitioner, the Alabama Department of Corrections, respectfully submits that the decision and opinions of the United States District Court for the Middle District of Alabama and the Court of Appeals for the Eleventh Circuit taxing attorney's fees

against the State of Alabama are in error. For this reason, Petitioner prays that this Honorable Court will issue the writ of certiorari and review the above-mentioned opinions and upon such review will reverse those portions of the decision of said Courts, pertaining to the issue of as the attorney's fees.

Respectfully submitted,

Charles A. Graddick

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ATTORNEY GENERAL

Billington M. Garrett

BILLINGTON M. GARRETT
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Billington M. Garrett, an Assistant Attorney General and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the Alabama Department of Corrections, Petitioner, do hereby certify that on this 9th day of May, 1985, I did serve the requisite number of copies of the foregoing on the Attorney for Willie James Glover, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Frank Wilson
P.O. Box 4357
Montgomery, Alabama 36107

Billington M. Garrett
BILLINGTON M. GARRETT
ASSISTANT ATTORNEY GENERAL